88-1682

NO. 88-

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1988

DONALD A. BREMNER,
DOROTHY G. BREMNER,
KATHLEEN M. FISCHEL,
CORINNE C. STRAUSER,

Petitioners

v.

HAWAII HOUSING AUTHORITY,
State of Hawaii and its
Designee Arbitrator,
WENDELL H. MARTIN,
KALAMA LAND COMPANY, LTD.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF HAWAII (CIVIL)

(NO. 12471)

c/o Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
(808) 261-2494: pro se

MARCH 1989

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

PETITION FOR WRIT OF CERTIORARI

a. Questions Presented:

1. Were Appellant's existing residential lease contracts impaired under Article I, Section 10 of the Constitution of the United States by the action of a state arbitrator acting under Hawaii Revised Statutes (HRS) Section 519-2, when he awarded two 15-year term rents instead of one rent for the remaining 30-year term of the leases?

2. Did the Supreme Court of the State of Hawaii err when it denied Appellant's appeal, based on the above constitutional issue, on procedural grounds in contradiction to its established precedent thereby preventing adjudication of the above-referenced constitutional issue?

b. Parties to the Proceedings:

All parties to these proceedings are contained in the caption of the case as listed on the cover sheet of this document.

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TABLE OF AUTHORITIES

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Rules of the Supreme Court

d. Prior Administrative and Court Judgements:

1. On February 26, 1987, the State's arbitrator rendered his awards in subject case setting two fifteen-year term lease rents for lessees-appellants as follows:

Bremner

For the 15-year period commencing July 1, 1979	$4300
For the 15-year period commencing July 1, 1994	$6500

Fischel

For the 15-year period commencing January 1, 1982	$5700
For the 15-year period commencing January 1, 1997	$8600

Strauser

For the 15-year period commencing August 1, 1984	$6300
For the 15-year period commencing August 1, 1999	$9500

2. On May 7, 1987 (entered May 11), Hawaii State Circuit Court Judge Richard Y. C. Au refused to dismiss Appellant's appeal construing it to be a Motion to Modify, Correct or Vacate Arbitration Awards under HRS 658 and allowed ten days in which to join Kalama Land Company, Ltd. as a party. (Appendix, A-1)

3. On September 16, 1987 (entered October 7, 1987), Hawaii State Circuit Court Judge Simeon R. Acoba denied Appellant's Motion to Modify, Correct or Vacate Arbitration Awards and granted Kalama Land Company's Motion to Confirm the Arbitration Awards. (Appendix, A-2)

4. On July 8, 1988, the Supreme Court of the State of Hawaii denied Appellee Kalama's Motion to Dismiss the Appeal for Lack of Jurisdiction claiming that Appellant's initial circuit court appeal had been a mistaken label of complaint and had failed to join Ka-

lama as a party. (Appendix, A-4)

5. On October 19, 1988 (entered December 9, 1988), the Supreme Court, State of Hawaii, denied Appellant's appeal on the same procedural grounds as contained in Appellee Kalama's Motion to Dismiss for Lack of Jurisdiction referenced above. (Appendix, A-5)

e. Grounds for Jurisdiction:

This is a civil proceeding arising from a statutorily mandated residential lease rent arbitration under HRS 519-2 (1975); a subsequent confirmation of the arbitration awards by the first circuit court of the State of Hawaii and a denial of an appeal of that decision by the Supreme Court of the State of Hawaii on procedural grounds. The order denying Appellant's appeal was entered in the Hawaii Supreme Court on December 9, 1988.

This appeal is brought pursuant to USC Title 28, Section 1257(a), and Section 2101(c)

allowing a review of a decision by the State Supreme Court involving a constitutional issue.

f. Constitutional Provisions Involved:

The action of the State's designated Arbitrator, acting under State law (HRS 519-2) in establishing two lease rents instead of one for the remaining term of the lease substantially impaired the existing lease contracts between the subject lessees and the lessor in violation of Article I, Section 10 of the Constitution of the United States, prohibiting contracts from being impaired by state laws.

g. Statement of the Case:

Lessee-Appellants live on lease-hold land, under lease arrangements which are contained in contracts between the lessor, Kalama Land Company, Ltd. and Donald and Dorothy Bremner; Kalama Land Co. and Kathleen M. Fischel; and Kalama Land Co. and Corinne C.

Strauser on three separate parcels. Strauser's lease was assigned to her in 1959; Fischel's in 1963 and the Bremners' in 1969.

On June 3, 1986, the lessor, Kalama Land Co. called for lease rent renegotiations in accordance with existing agreements. On July 29, 1986, claiming an impasse in negotiations (despite the fact that some were not begun), the lessor invoked arbitration under a state law (HRS 519-2) controlling certain leases.

On February 26, 1987, a single arbitrator acting as a state designee, rendered his award setting two 15-year term lease rents in stepped-up values instead of one rent for the remaining 30-year term of the leases. The matter of multiple or stepped-up lease rents was not a matter that had been submitted to the arbitrator.

The arbitrator's award was appealed to the Circuit Court of the State of Hawaii pursuant to HRS 519-2 and HRS 658. A Motion for

Dismissal of the appeal on the basis that it was a mistaken label of complaint and that it failed to join the Kalama Land Company, Ltd. was denied on the ground that non-joinder of a party in the State of Hawaii is not ground for dismissal of an appeal. In addition the court allowed ten days in which to join Kalama as a party. Subsequently the constitutional issue involved in the case was stated in pleadings submitted to the court some 44 days prior to the hearing as well as argued before the court at the hearing.

The Circuit Court upheld the arbitrator's awards on the basis that the power of an arbitrator is broad and discretionary.

The Circuit Court judgement was appealed to the Hawaii Supreme Court on the strength that the Circuit Court erred in finding that the arbitrator's power goes beyond that prescribed by the parties in contracting for his

services and failed to consider the constitutional issues involved. These same constitutional issues were addressed to the Hawaii Supreme Court in Appellant's opening brief April 4, 1988.

On June 23, 1988, Appellee Kalama Land Co. filed a Motion to Dismiss the Appeal before the Hawaii Supreme Court for Lack of Jurisdiction, claiming the initial Circuit Court appeal was a mistaken label of complaint and that the non-joinder of Kalama in that initial appeal was a ground for dismissal. On July 8, 1988 the Motion was denied by the Hawaii Supreme Court. (Appendix, A-4)

However, on October 19, 1988 the Hawaii Supreme Court in a Memorandum Opinion, denied Appellant's appeal on the same procedural grounds as proffered by Kalama Land Co. in the above-referenced Motion to Dismiss for Lack of Jurisdiction. The Judgement of the Hawaii Supreme Court was entered on December 9, 1988.

h. Reasons Dictating Review:

The questions presented - concerning a basic constitutional violation - have never been addressed and therefore never adjudicated. The result of this is to relegate Appellants to suffer a possible impairment of their lease contracts for the next 23-30 years.

i. Not applicable because this appeal is not from a Federal District Court.

j. Argument:

The Arbitrator, acting under the mantle of state law, exceeded his authority and impaired the existing lease contracts of petitioners when he set more than one lease rent for the remaining term of subject leases. The applicable provisions of subject leases state:

> TO HAVE AND TO HOLD the above mentioned premises with the rights, privileges and appurtenances to the same belonging to or appertaining unto said lessee for the term of fifty-five (55) years commencing with the (date): the lessee

> yielding and paying _____per annum for the first twenty five years of said term and for and during the remaining thirty years of said term, such annual rent as shall be mutually agreed upon by the lessor and the lessee, or in the event of failure to reach agreement prior to ninety (90) days before the end of the first twenty-five year period, such net annual rent as shall be determined by arbitration . . .

The interpretation of this language has been addressed by Hawaii's courts. In a 1978 Declaratory Judgement (Midkiff, et al. v. Amemiya, et al., Civil #47103) HLR 78-59, the court found that the same language in existing B. P. Bishop Estate leases required the setting of one lease rent for the entire remaining term (30 years) of the lease, and that the 15-year reference in Act 185 (HRS 519-2) had no effect on that requirement. The court said,

> The tract A form of lease at issue in this case fixes the rent for an initial period of 25 years and then for the remaining 30 years at an amount to be renegotiated between the parties. Since the rent is fixed on renegotiation for the remaining 30 years of the lease, the fifteen year limitation provision in Act 185 has no effect on this lease.

The contract for arbitration services did not authorize or stipulate any different approach to setting a rent than that contained in the leases themselves. The applicable provision reads:

> ARBITRATOR shall determine and make an award of the lease rent payable to Lessor for the properties identified in the leases attached hereto as Exhibits B through D in compliance with any stipulations by the parties involved, Section 519-2 HRS as well as the applicable provisions of Chapter 658 HRS and Chapter 17-542, Hawaii Administrative Rules.

HRS 519-2 (Appendix, A-7) covers applicability as follows:

> All leases as defined by Sec. 516-1(5) of residential lots, as defined by Sec. 516-1(11), existing on June 2, 1975, or entered into thereafter, which provide the following, or in the case of leases existing on June 2, 1975 shall be construed in conformity with the following:

Subject leases validly existed prior to June 2, 1975 and cannot be altered by this statute or by any action under the guise of this state law. The arbitrator claimed no other authority which would allow him to

award more than one lease rent for the remaining term of the leases. Under an attempted deposition he was asked:

> Q. What authority did you use to do that? (set two lease rents)
> A. The authority . . . the lease indicated that the lease rent was to be set for the next thirty years.
> Q. Yes it did.
> A. That's the authority I used.

The issue was again argued at trial:

> Q. Did you in the course of pursuing this particular question review our lease documents?
> A. (Arbitrator) Yes sir.
> Q. Did you find any authority in these to allow for the setting of two lease rents instead of one for the remaining period?
> A. The lease says specifically that the annual rent is to be set for the final 30-year period.
> Q. Yes it does. What caused you to believe that the statute then superseded the lease documents, a contract between private parties? (Transcript of trial testimony)

An objection to this inquiry was then sustained by the court. The arbitrator's understanding of the contract for arbitration services was pursued next:

A. (Arbitrator) In the contract for service, the question, is it stated that a step-up rent is to be provided?
Q. Was in issue, yes?
A. Was in issue?
Q. Yes.
A. A step-up rent was in issue, no. The rent was the issue.
Q. Singular rent?
A. The only rent for the property for the next 30 years.
(Transcript of trial testimony)

The court verified its understanding of this testimony for in subsequently sustaining an objection said:

> I'll sustain the objection. He's testified to there was nothing in the contract relating to step-up rents.

With the lease documents and the contract for his services dispensed with as sources of authority for his multiple rent awards, the arbitrator turned to the statute as his source:

Q. Did you use any existing authority that you can tell us about to set this step-up lease rent?
A. The statute 516(519) indicates that minimum rent periods are 15 years in length, a minimum of 15 years.
Q. Do you have a copy of the statute?

A. Not with me. But I believe it refers to 15-year increments which talks about the rent itself of a minimum requirement that you cannot set the rent for any less than 15 years.

Q. I think the provision you're referring to is 519-1 which is on the top of that page. And I will let you look at it and then ask you to read what it says.

A. It says quote, "such renegotiation shall not be exceeded more frequently than once every 15 years, provided that the first of such reopenings shall not be scheduled prior to the fifteenth year following the initial date of the lease."

Q. And the key word, from what I hear, is renegotiation and you didn't set a renegotiation. You set a lease rent.

A. Yes sir.

Q. But that's not the authority you used?

A. Well, that is something in the statute which led you to believe, in my opinion, I could set up a step-up as I was setting the rent for the 30-year period.

Further:

Q. To your knowledge, Mr. Martin, are there any other provisions in that statute that would apply to this particular question of whether or not our leases are subject to the standard of a renegotiation every 15 years?

A. No sir, there's nothing in here that says it couldn't be set for the 15-year period.

Q. Are you sure about that?
A. Yes sir. That was my interpretation of the statute.
(Transcript of trial testimony)

If the arbitrator is correct that the statute gave him the authority to set multiple lease rents in contradiction to the existing lease contracts, then a state law has acted to substantially impair them. If he is incorrect, then he, acting as an arm of the state government under the statute (HRS 519-2) has perpetrated an impairment of petitioner's contracts through a misconception of the law. In so doing, the arbitrator acted on a matter not submitted to him in contravention of HRS 658-10 and prevailing case law covering arbitrations:

> A mistake or error of fact or law which is so gross and palpable as to be evidence of misconduct or undue partiality may however be a ground for impeachment, as may be a misconception of law which is so perverse as to work manifest injustice (6 Corpus Juris Secondum 154, p-412). See also Matter of Wilkens, 169 NR 9462 Beaufort Concrete Co. v. Atlantic States Const. Co. 352 F2d 460.

Further testimony of the arbitrator at trial confirmed that the matter of multiple lease rents was not submitted to him by the parties:

> Q. Who submitted the issue of two lease rents to you then?
> A. There was no submission of two lease rents to me.
> Q. Did the lessees ever agree to, or in any way indicate to you that you were to consider a two-step lease rent?
> A. No sir.
> (Transcript of trial testimony)

Hawaii law holds that, "An award not within the terms of submission will be set aside," Notely v. Davies, 5 Haw 43; See also, Communications Equipment Workers Union v. Western Electric, 320 F Supp 1277; Shahmoon Industries Inc. v. United Steel Workers of America, 263 F Supp 60.

That the lease contracts of petitioners have been impaired to the detriment of petitioners because of, or under the guise of, state law is clear. That the Hawaii courts have chosen not to adjudicate this issue threatens to relegate petitioners to suffer

this impairment in perpetuity for the remaining terms of their leases (23-30 years). Under the terms of Article I, Sec. 10 of the Constitution of the United States prohibiting such contract impairment by state law, the issue commands review and redress by the Supreme Court of the United States.

In addition, the Hawaii Supreme Court's refusal to address the subject case on its merits thereby leaving the constitutional issue without adjudication is contrary to the policy of that court and the precedents in similar situations established by its case histories.

First the Hawaii Supreme Court stated in its Memorandum Opinion of October 19, 1988 that "the record is devoid of any certificate of service on Kalama Land Company, Ltd." (the lessor) Such certificate of service was indeed contained in the record that the court had before it, having been served on the Ka-

lama Land Co. on May 19, 1988 with the Second Motion to Vacate, Modify or Correct Arbitration Awards which was made in accordance with Judge Richard Y. C. Au's ruling in the lower court to remedy the initial non-joinder of Kalama Land Co. (Appendix, A-1)

Rule 21 of the Hawaii Rules of Civil Procedure states:

> Rule 21: Misjoinder and Non-Joinder of Parties. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms that are just. Any claim against a party may be severed and proceeded with separately by order of the court.

If non-joinder of a party is not a ground for dismissal of an action then the time granted by the court to effect the joinder cannot be, or act to be, a ground for dismissal of an action. Extensive Hawaii case law forms the foundation of this rule. In Marsland v. Pang, 5 Haw App 463; 701 P2d 175, the Hawaii Supreme Court holds that:

> Failure to name a real party in interest in complaint is not a ground for dismissal.

In McCandless v. Carter, 18 Haw 218, the court finds that lack of notice to the opposite party does not affect the jurisdiction of the trial judge to allow an appeal. In Midkiff v. Kobayashi 54 Haw 299; 507 P2d 724 the Hawaii Supreme Court rules that:

> Even if a circuit court ruling on the matter of indipensable party was erroneous, reversal was not required where there was important issue on appeal.

In In Re Eric G., 65 Haw 219, the Hawaii Supreme Court reverses a lower court's dismissal of a "mistaken label" of complaint with the following reasoning:

> The mistaken label of complaint as a Notice of Appeal and the mistaken reliance on Chapter 91, HRS by the Appellant do not vitiate the clear statement in the Notice of Appeal that the proceedings were based, in part, at least, on 20 USC 141. Substance controls over form. A claim for relief was stated and thus dismissal was erroneous.

This case is almost directly on target

with the facts in subject case since it was a "mistaken label of complaint" that caused the non-joinder of Kalama Land Co. but a proper claim for relief was stated and the proper statute cited in a timely manner under a Notice of Appeal. This case law has established the precedent of the Hawaii Supreme Court to allow substance to control over form and to allow appeals to be adjudicated on their merits. The precedent has advanced to the point where it is stated as a "policy" by the court. See Montalvo v. Chang, 64 Haw 345; 641 P2d 1321, and Jordan v. Hamada, 63 Haw 444, wherein it is stated that:

> The policy of the Supreme Court is to permit litigants, where possible, to appeal and to hear a cause on its merits.

The action of the Hawaii Supreme Court in subject case is contrary to this policy and precedent and because of this contradiction, commands review by the Supreme Court of the United States.

Dated this 8TH day of MARCH 1989.

Donald A. Bremner, pro se
348 Dune Circle
Kailua, Hawaii 96734

Dorothy B. Bremner, pro se
348 Dune Circle
Kailua, Hawaii 96734

Kathleen M. Fischel, pro se
376 N. Kalaheo Ave.
Kailua, Hawaii 96734

Corinne C. Strauser, pro se
51 Kaumana Pl.
Kailua, Hawaii 96734

APPENDIX

Donald A. Bremner
348 Dune Circle
Kailua, Hawaii 96734
261-2494
Appearing pro se

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, CORINNE C. STRAUSER, Lessees, Appellants v. HAWAII HOUSING AUTHORITY, State of Hawaii, and its designee, Arbitrator WENDELL H. MARTIN, Appellees.	CIVIL NO.87-0799-03 ORDER RE: MOTION TO DISMISS NOTICE OF APPEAL

ORDER RE: MOTION TO DISMISS NOTICE OF APPEAL

Appellees' Motion to Dismiss Notice of Appeal, having come on for hearing before the Honorable Richard Y. C. Au on Friday April 24, 1987 at 2:30 P. M., Colleen H. Sakurai appearing on behalf of Appellees and Donald A Bremner appearing on behalf of

Appellants, and this Court having heard the arguments of the parties, reviewed the memoranda and the records and files herein:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Appellant Donald A. Bremner will be allowed to proceed on his and his wife's, Appellant Dorothy G. Bremner, behalf in this and future proceedings. Appellant Donald A. Bremner will not be allowed to represent Appellants Kathleen M. Fischel and/or Corinne C. Strauser.

2. For purposes of this proceeding, Appellants Kathleen M. Fischel and Corrine C. Strauser shall be treated as if they proceeded pro se.

3. The Kalama Land Company, Ltd. shall be added to the action as a party defendant, Appellee.

4. The Appellants will be allowed to

amend their pleadings and file a separate Motion to Vacate, Modify, Correct or Stay the Arbitration Awards. This Court, sua sponte, further orders, adjudges and decrees that:

a. The time in which Appellants may file a Motion to Vacate, Modify, Correct or Stay the Arbitration Awards shall be extended from the date of the award until ten days after the entry of this order. This extension of time shall apply to all above-named Appellants.

5. Appellees Wendell H. Martin and The Hawaii Housing Authority may be dropped from this proceeding upon the presentation of a proper motion by any party following the receipt of the Appellants amended pleadings.

On all other issues, the matter is continued until amended pleadings have been served by the Appellants and an answer ac-

complished.

DATED: Honolulu, Hawaii, May 7, 1987

/S/ R. Y. C. Au
JUDGE OF THE ABOVE ENTITLED COURT

Of Counsel:
ASHFORD & WRISTON

ROSEMARY T. FAZIO 2228-0
LORRIN B. HIRANO 3685-0
235 Queen Street, 6th Floor
P. O. Box 131
Honolulu, Hawaii 96810
Telephone No. 524-4787

Attorneys for Lessor-Appellee
KALAMA LAND COMPANY, LTD.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, CORINNE C. STRAUSER, Lessees, Appellants, vs. HAWAII HOUSING AUTHORITY, State of Hawaii, and its designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND COMPANY, LTD. Appellees.	CIVIL NO.87-0799-03 ORDER DENYING SECOND MOTION TO VACATE, MODIFY OR CORRECT ARBITRATION AWARDS Hearing Date: September 16, 1987 Hearing Time: 9:00 a.m. Judge: Honorable Simeon R. Acoba

ORDER DENYING SECOND MOTION TO VACATE, MODIFY OR CORRECT ARBITRATION AWARDS

This matter having come on for hearing on September 16, 1987 at 9:00 a.m. before

the Honorable Simeon R. Acoba; Colleen Sakurai, Esq. having appeared for the Hawaii Housing Authority, Lorrin B. Hirano, Esq. having appeared for the Kalama Land Co., Ltd., Donald A. Bremner having appeared pro se and for Dorothy Bremner, Corinne Strauser having appeared pro se, and Kathleen Fischel having appeared pro se; the Court having reviewed the Motion, memoranda, affidavits, and exhibits filed herein, having heard testimony of Wendell Martin, being fully advised in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Donald A. Bremner's, Dorothy Bremner's, Corinne Strauser's, and Kathleen Fischel's Second Motion to Vacate, Modify or Correct Arbitration Awards is denied.

DATED: Honolulu, Hawaii; Oct 6, 1987.

/S/ Simeon R. Acoba, Jr.
Judge of the above-entitled Court

Of Counsel:
ASHFORD & WRISTON

ROSEMARY T. FAZIO 2228-0
LORRIN B. HIRANO 3685-0
235 Queen Street, 6th Floor
P. O. Box 131
Honolulu, Hawaii 96810
Telephone No. 524-4787

Attorneys for Lessor-Appellee
KALAMA LAND COMPANY, LTD.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, CORINNE C. STRAUSER, Lessees, Appellants, vs. HAWAII HOUSING AUTHORITY, State of Hawaii, and its designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND COMPANY, LTD. Appellees.	CIVIL NO.87-0799-03 ORDER GRANTING KALAMA LAND CO., LTD'S MOTION TO CONFIRM ARBITRATION AWARDS AND HAWAII HOUSING AUTHORITY'S JOINDER IN MOTION TO CONFIRM ARBITRATION AWARDS Hearing Date: September 16, 1987 Hearing Time: 9:00 a.m. Judge: Honorable Simeon R. Acoba

ORDER GRANTING KALAMA LAND CO., LTD.'S MOTION TO CONFIRM ARBITRATION AWARDS AND HAWAII HOUSING AUTHORITY'S JOINDER IN MOTION TO CONFIRM ARBITRATION AWARDS

This matter having come on for hearing

on September 16, 1987 at 9:00 a.m. before the Honorable Simeon R. Acoba; Colleen Sakurai, Esq. having appeared for the Hawaii Housing Authority, Lorrin B. Hirano, Esq. having appeared for the Kalama Land Co., Ltd., Donald A. Bremner having appeared pro se and for Dorothy Bremner, Corinne Strauser having appeared pro se, and Kathleen Fischel having appeared pro se; the Court having reviewed the Motion, memoranda, affidavits, and exhibits filed herein, having heard testimony of Wendell Martin, being fully advised in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Kalama Land Co. Ltd.'s Motion to Confirm Arbitration Award and the Hawaii Housing Authority's Joinder in Kalama Land Co. Ltd.'s Motion to Confirm Arbitration Award are granted, and the Arbitration Awards dated February 26, 1987 as to the annual rents for the lots designated as TMK Nos.

4-3-17-08, 4-3-17-42 and 4-3-15-33 are hereby confirmed.

DATED; Honolulu, Hawaii; Oct 6, 1987

/S/ Simeon R. Acoba, Jr.

NO. 12471

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD A. BREMNER, et al., Appellants-Appellants, vs. KALAMA LAND COMPANY, LTD., Appellee-Appellant, and HAWAII HOUSING AUTHORITY, State of Hawaii, and its designee, Arbitrator WENDELL H. MARTIN, Appellees-Appellees.	CIV. NO.87-0799-03

ORDER

Upon consideration of the Motion to Dismiss Appeal for Lack of Jurisdiction, and the papers in support thereof,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawaii, July 8, 1988

FOR THE COURT:
/S/ H. Lum
Chief Justice

NO. 12471

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Appellants-Appellants, vs. HAWAII HOUSING AUTHORITY (State of Hawaii) and its designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND CO., LTD., Appellees-Appellees.	) CIVIL NO.87-0799)) APPEAL FROM THE ORDER GRANTING KALAMA LAND CO. LTD.'S MOTION TO CONFIRM ARBITRATION AWARDS AND HAWAII HOUSING AUTHORITY JOIN IN MOTION TO CONFIRM ARBITRATION AWARDS; AND ORDER DENYING SECOND MOTION TO VACATE, MODIFY OR CORRECT ARBITRATION AWARDS, FILED OCTOBER 7, 1987

FIRST CIRCUIT COURT

HONORABLE SIMEON R. ACOBA, JR.
HONORABLE ROBERT G. KLEIN
HONORABLE RICHARD Y.C. AU
Judges

MEMORANDUM OPINION

This is an appeal from a circuit court refusal to vacate an arbitration award. The arbitration in question was conducted under the provisions of HRS 519-2 and an agreement executed between the parties to the arbitra-

tion and the arbitrator. Since the arbitration was based on an agreement, the provisions of HRS Chapter 658 apply. An order confirming the arbitration award entered on October 7, 1987 and thus the refusal to vacate the award is appealable. Salud v. Financial Security Insurance Co., 69 Haw.Adv. 437, 745 P 2d 290 (1987).

However, HRS 658-11 provides that notice of a motion to vacate, modify or correct an award shall be served on the adverse party within 10 days after the award is made and served. In this case, appellants filed a document entitled "Notice of Appeal to Circuit Court" and designated as appellees the Hawaii Housing Authority and the arbitrator rather than the opposing party in the arbitration, the Kalama Land Company, Ltd. Only the designated appellees were served within 10 days after the award. Appellees moved to dismiss the appeal. On May 11, 1987, over

two months after the notice, the circuit judge entered an order adding Kalama Land Company, Ltd., as a party to the appeal. The record is devoid of any certificate of service on Kalama Land Company, Ltd. On July 24, 1987, Kalama Land Company moved to confirm the award and that order was granted October 7, 1987.

Since there was no compliance with the clear requirements of HRS 658-11, the circuit court could not vacate the arbitration award, and had no option but to confirm the award when requested. Moreoever, on the record, there clearly were no grounds to vacate or modify the award. Affirmed.

DATED: Honolulu, Hawaii, October 19, 1988.

Donald A. Bremner,
Dorothy G. Bremner,
Kathleen M. Fischel,
Corinne C. Strauser
on the briefs, appellants pro se

/S/H. Lum
/S/Edward A. Nakamura
/S/F. Padgett
/S/Yoshimi Hayashi
/S/J. Wakatsuki

Colleen H. Sakurai
(Koshiba & Young) on
brief for appellee
Hawaii Housing Authority

NO. 12471

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD A. BREMNER, DOROTHY G. BREMNER, KATHLEEN M. FISCHEL, and CORINNE C. STRAUSER, Appellants, vs. HAWAII HOUSING AUTHORITY, State of Hawaii and its Designee, Arbitrator WENDELL H. MARTIN, KALAMA LAND CO., LTD., Appellees.	) CIVIL NO.87-0799

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Supreme Court of the State of Hawaii entered herein on October 19, 1988, the Order confirming the arbitration award entered on October 7, 1987, is affirmed.

DATED; Honolulu, Hawaii: Dec 9, 1988

BY THE COURT:

APPROVED: /S/Sandra N. Yasui
OF CLERK

/S/Frank D. Padgett
JUSTICE OF THE ABOVE-ENTITLED COURT

CHAPTER 519
REAL PROPERTY LEASES

SECTION

519-2 Residential Leases of Real Property

519-2 Residential leases of real property. (a) All leases as defined by section 516-1(5), of residential lots, as defined by section 516-1(11), existing on June 2, 1975, or entered into thereafter, which provide for reopening of the contract for renegotiation of lease rent terms shall in the case of leases after June 2, 1975, provide the following, or in case of leases existing on June 2, 1975, shall be construed in conformity with the following:

(1) Such renegotiations shall not be scheduled more frequently than once every fifteen years, provided the first of such reopenings shall not be scheduled prior to the fifteenth year following the initial date of the lease; and

(2) Upon renegotiation, the lease rent payable shall not exceed the amount derived by multiplying the "owner's basis" by four per cent. For purposes of this section, "owner's basis" means the current fair market value of the lot, excluding onsite improvements, valued as if the fee title were unencumbered; less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the land, which replacement cost shall include an overhead

and profit not exceeding twenty per cent of the current replacement cost of the existing offsite improvements, or less the original lot development credit to the lessee, whichever is greater. For purposes of this section, "offsite improvements" means all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and underground utility cables, constructed or placed in a subdivision or development off the land intended for occupancy, which improvements are to be used in common by occupants of all lands adjoining such improvements or by occupants of all lands for whose benefit the improvements have been constructed or placed; and "onsite improvements" means all physical improvements placed on a residential lot intended for occupancy which improvements are for the benefit of occupants of that lot, including but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

(b) In the event the parties to a lease are unable to achieve an agreement under any reopening provision, the Hawaii housing authority or its designess shall arbitrate, and its findings shall be binding and conclusive on both parties. Arbitration proceedings under this subsection will be subject to the following requirements:

(1) An advance deposit, which amount shall be determined by the authority, equal to projected expenses and fees of the authority or its designee for arbitration proceedings shall be required and shall be paid equally by

lessees and lessors. All additional expenses and fees incurred by the authority or its designee while acting as the arbitrator shall be borne equally by lessees and lessors. These additional expenses and fees shall be subject to monthly billings or other arrangements which may be specified by contract. If more than one lessee is involved in an arbitration proceeding, all lessees shall share equally in one-half of the arbitration costs. The same division of costs shall apply if more than one lessor is involved in a proceeding.

(2) Failure on the part of lessees to comply with the provisions set forth in this subsection, including failure to make advance deposits or payments, shall result in forfeiture of any rights or remedies under this chapter for arbitration, and the lessees' sole rights and remedies shall be as provided in the lease document.

(3) If lessors fail to comply with the provisions of this subsection, including failure to make advance deposits or payments, then arbitration proceedings under this chapter will cease and the lease rent shall be set at the most recent fixed lease rent. Upon compliance with the provisions of this chapter, the arbitration may proceed, with the determination of the new lease rent effective only from the date of compliance by the lessor.

(4) Except as provided in paragraphs (b)(2) and (b)(3) above, all new lease rents shall be effective as of the

date of reopening.

For the purpose of this subsection, "arbitration proceedings" means the actual arbitration conducted by the authority or its designee pursuant to a contract executed by and among the lessees, lessor, and the arbitrator detailing among other things, the following: description of properties involved, time of performance, compensation, method of payment, settlement and other procedures, and termination.

(c) Any covenant or provision of a lease in violation of this section, shall not be enforceable in any court in this State.

(d) For the purpose of this section renegotiation shall not include negotiation for the determination of lease rental under section 516-66 arising out of an extension under section 516-65. [L 1975, c 185, 2(2); am L 1976, c 242, 5; am L 1979, c 105, 49; am L 1984, c 191, 1]